No. 82-1024

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THE BOEING COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER THE BOEING COMPANY

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ARGUMENT

Respondent argues that The Boeing Company's challenge to the validity of Cost Accounting Standard ("CAS") 403 is precluded because Boeing "agreed" to it, an argument not relied upon by the Court of Claims. Alternatively, respondent defends the conclusion of the Court of Claims that the Department of Defense ("DOD") adopted CAS 403 voluntarily and independently of the Cost Accounting Standards Board ("CASB"). Respondent also urges that the case involves only $972 and does not have importance warranting the Court's attention, ignoring the fact that this case affects virtually every contract since 1974 between the United States and the nation's fifth-largest defense contractor.

Respondent's silences, however, are more revealing than its arguments. The Brief in Opposition is remarkable for its failure either to defend the constitutionality of the legislation creating the CASB, amounting to a tacit admission that the CASB and its promulgated regulations are unconstitutional, or to defend the Court of Claims' erroneous refusal to reach that issue on "*de facto* officer" grounds.

1. Respondent's first argument, that petitioner "agreed" to CAS 403, is incorrect. The Court of Claims expressly declined to decide the case on that ground.[1] Pet. App. at A-11. Respondent correctly states (Brief in

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[1] Citing *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 113, 462 F.2d 1388, 1392 (1972), which held:

> "Since government contracts are contracts of adhesion, and since the government refuses to deal with contractors who would reject the Renegotiation Article, it is clear the issue is not foreclosed by defendant's argument that plaintiff voluntarily entered into renegotiable contracts and must accept all their implications. . . . There is a presumption against waiver of constitutional rights."

Opposition at 3) that CAS 403 could become applicable to petitioner's contract "only if petitioner voluntarily entered into another government contract that incorporated the new standard." Respondent does not identify evidence of any agreement by Boeing to CAS 403 in another government contract or otherwise, but, instead, relies on a stipulation in the Armed Services Board of Contract Appeals ("ASBCA") proceeding that CAS 403 "became applicable" to this contract on January 1, 1974. Brief in Opposition at 4. This stipulation is urged out of context by respondent and does not reflect any "agreement" of petitioner to CAS 403.

The stipulation was entered into on May 28, 1975, at the start of the ASBCA hearing, after the ASBCA had ruled that it would not consider Boeing's challenge to the validity of the standard. The stipulation meant that CAS 403 applied to the contract if it was valid. Boeing's Complaint to the ASBCA, No. 19224, paragraph 8, dated April 9, 1974, had alleged, *inter alia*, that CAS 403 was invalid. Respondent in paragraph 8 of its Answer of May 23, 1974, moved to strike the allegation of invalidity on the ground that the ASBCA did not have jurisdiction. Boeing applied for an order, over the government's objection, for discovery which related to the validity of CAS 403. At a prehearing conference on these issues, held August 21, 1974, the ASBCA ruled:

> "The Board will not determine the validity of Cost Accounting Standard 403 or examine into the propriety of the procedure which preceded its promulgation . . . [T]he Board will review the government's contractual disallowance of certain state and local taxes and determine whether or not the disallowance was justified under the cost accounting standard in question."

Letter of Judge Norman dated August 21, 1974, App. 4 to Plaintiff's Motion for Summary Judgment and Brief in the

Court of Claims. When the ASBCA hearing commenced, the stipulation reflected the prior decision of the ASBCA that the only issues it would consider concerned the interpretation and application of CAS 403. Moreover, before entering into this stipulation, the United States had agreed with Boeing to use this case as a test case and to reserve Boeing's rights with respect to other contracts pending the resolution of this case. Pet. at 5, n.2; stipulation dated May 28, 1975, ASBCA No. 19224, 8 ("the subject of this dispute is intended to be a pilot disapproval representing all of Appellant's contracts which are subject to Cost Accounting Standard, Part 403, for which costs are incurred on or after January 1, 1974. Accordingly, the parties are not presently seeking a determination of quantum").[2]

The claim of invalidity of CAS 403 was properly preserved before the ASBCA and then was presented in Boeing's petition to the Court of Claims. There was no intent in the ASBCA stipulation to waive Boeing's claim that CAS 403 is invalid. The ASBCA had held that it could not decide that issue. The ASBCA opinion observed: "Although raised at an early stage of these proceedings, issues of the validity of CAS 403 and the propriety of the procedure by which it was promulgated were not litigated in these proceedings." Pet. App. at B-2.

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[2] Respondent (Brief in Opposition at 9) argues that the reservation clause only related to accounting practices "under CAS 403," and not to validity. That is incorrect. The reservation-of-rights clause attached to the O'Hara affidavit provides that the issues reserved were all those in dispute in the "Contractor's appeal appearing in ASBCA Docket 19224," which included Boeing's allegation (Complaint ¶ 8) that CAS 403 was invalid. The clause provides that the parties agreed that "the decisions of the ASBCA or the courts, as the case may be, on the issues involved in the referenced dispute shall be binding on the parties under this contract."

It cannot fairly be said that Boeing agreed to CAS 403 where it (1) challenged the validity of CAS 403 in its ASBCA complaint, (2) concluded an agreement with the government to reserve its rights in all contracts pending the outcome of this dispute as a test case, and (3) after the ASBCA decision, took its allegation of invalidity to a court of law with jurisdiction to consider the issue.

2. Respondent's second argument—that DOD independently and voluntarily adopted CAS 403—is also without merit.

First, it is plain that DOD did not believe it was doing anything of the kind, but considered itself obligated by Public Law 91-379 to adopt the CASB's standards "for compliance with this law and the regulations issued thereunder." *See* Pet. at 16, n.11 and Defense Procurement Circular ("DPC") No. 99, there quoted.[3] Respondent contends (Brief in Opposition at 10) that it should be inferred from DPC No. 111, which republished CAS 403, that DOD acted independently and voluntarily. DPC No. 99, however, is the critical document; it implemented the overall regulatory scheme for the required use by contractors of *all* Cost Accounting Standards promulgated by the CASB in the future unless the CASB (not DOD) prescribed exemptions. Pet. App. at F-68 *et seq.*; see especially *id.* at F-79-80. This language makes it clear beyond dispute that DOD regarded both itself and contractors as bound to follow the statute and to apply the standards. No discretion on DOD's part was involved; it did not even know what the standards to be promulgated in the future would be. There was no need for DOD to

[3] Because of a typographical error, Pet. at 16, n.11 inaccurately refers to Public Law 91-369; the reference should be to 91-379.

repeat all the provisions of DPC No. 99 every time it republished a new CAS, as it did in DPC No. 111.[4]

Second, DOD was correct in viewing the CASB's pronouncements as mandatory, not merely advisory. The language of the governing statute makes that clear: "[s]uch promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. App. § 2168(g) (1976).[5] Respondent's argument (Brief in Opposition at 10, n.6) that the statutory words "shall be used" could mean "used" only as "advisory" guidelines flies in the face of the plain meaning. Moreover, respondent ignores the context. Since the word "used" applies to contractors as well as agencies, either respondent is contending that contractors as well as agencies are free to treat the standards as merely advisory or it is contending that "used" means one thing for agencies and something different for contractors. Neither theory is plausible.

The legislative history confirms that Congress intended the CASB to promulgate cost accounting standards required for use by DOD. The Senate Report on 40 U.S.C. § 2168(g) stated:

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[4] Even DPC No. 111 indicates on its face that DOD was acting because it was required to do so by the CASB legislation. As stated in DPC No. 111, the changes to ASPRs being made were "published to reflect recent revisions to the CASB regulations and standards." Brief in Opposition at 1a. And DPC No. 111 published a "revised Appendix O, incorporating the latest published CASB changes." *Id.* at 3b.

[5] The CASB's regulations, as published at 37 Fed. Reg. 4143 (1972), likewise made it clear that the promulgated "rules and regulations established by the Cost Accounting Standards Board pursuant to 50 U.S.C. App. 2168" were mandatory: "The requirements set forth herein shall be binding upon all relevant Federal agencies and upon defense contractors and subcontractors." 4 C.F.R. § 331.10.

> "This subsection directs the Board to promulgate cost accounting standards designed to achieve *uniformity* and consistency in the cost accounting principles followed by defense contractors and subcontractors on negotiated defense procurement. . . . Hence, *the cost accounting standards would apply to negotiated contracts with the Department of Defense*, the Atomic Energy Commission, [and other agencies . . .]."

Defense Production Act-Amendments-Economic Stabilization, S. Rep. No. 91-890, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3768, 3772-73 (emphasis added).[6]

Third, respondent speculates that DOD *might* have regarded itself as free to adopt or to reject the CASB's standards on the theory—the same theory that petitioner urges here—that the CASB was unconstitutionally created as an agency promulgating mandatory rules for executive agencies. Respondent relies solely on the fact that President Nixon, when signing the bill creating the

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[6] The government's assertion that 10 U.S.C. § 2202 grants the DOD "independent authority to adopt regulations governing contracts, [n]otwithstanding any other provision of law," (Brief in Opposition at 10-11), is incorrect and based on a distorted reading of that statute. Section 2202, by its terms, merely provides that, "[n]otwithstanding any other provision of law, an officer or agency of the [DOD] may obligate funds . . . only under regulations prescribed by the Secretary of Defense." 10 U.S.C. § 2202 clearly applies to the obligation of funds by DOD officers or agencies, not to DOD's authority to prescribe regulations. Where, as here, DOD was required by a provision of law, 50 U.S.C. § 2168(g), to use the CAS standards, § 2202 does not give the DOD independent authority to adopt or to reject those standards.

The cases cited by the government, Brief in Opposition at 11, deal only with the powers of department agents and the supremacy of federal over state procurement policy; they do not authorize DOD to disregard statutory commands.

CASB, indicated that he had "doubted the power of the CASB to impose accounting standards on the executive branch." Brief in Opposition at 10. Because President Nixon "was still in office" when CAS 403 was adopted, respondent speculates that DOD might have acted on the basis of those doubts rather than in compliance with the statute he had signed. Respondent has produced no shred of evidence that such a course of events occurred or any other evidence that DOD thought it was using the CASB's pronouncements in a merely advisory fashion. To the contrary, DPC No. 99, issued after President Nixon's expressed "doubts" about constitutionality, made it clear that DOD considered itself bound by the CASB's standards. The theory that DOD *could* have adopted them on a discretionary basis is unacceptable in the light of *SEC* v. *Chenery*, 318 U.S. 80, 93-94 (1943). *See* Pet. at 16-17.

There is a conclusive reason why DOD could not properly have acted as respondent speculates it might have done. This Court has frequently held that only the courts, and not executive agencies, have authority to decide the constitutionality of a statute. As Mr. Justice Harlan noted in *Ostereich* v. *Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring), citing the Court's previous decision in *Public Utilities Commission* v. *United States*, 355 U.S. 534, 539 (1958):

> "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."

See also Weinberger v. *Salfi*, 422 U.S. 749, 765 (1975).[7]

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[7] Numerous lower federal courts have followed this principle. *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Panitz* v. *District of Columbia*, 112 F.2d 39, 41-42 (D.C. Cir. 1940). As observed in *McGrath* v. *Weinberger*, 541 F.2d 249, 251 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977):

Unless and until the courts have determined that a statute is invalid, agencies have no alternative but to comply with it. Thus, while petitioner agrees—and indeed urges—that the CASB's fixing of mandatory standards for executive agencies was unconstitutional, DOD could not lawfully have regarded the standards as merely "advisory" on that account.

3. Respondent claims that petitioner is "unable to specify any principled basis for determining the appropriate remedy for the constitutional violation it alleges" (Brief in Opposition at 11), and speculates that DOD might have adopted CAS 403 even if it had been proposed by a private body. For reasons already discussed, what DOD *might* have done is as irrelevant as it is unknowable. *SEC* v. *Chenery*, 318 U.S. 80 (1943). What is clear is that the contract at issue was governed by explicit principles for tax allocation before CAS 403 was promulgated; if CAS 403 is invalid, these prior principles remain in place, and it is established that on the basis of these principles Boeing is entitled to recovery. *Boeing Co.* v. *United States*, 202 Ct. Cl. 315, 480 F.2d 854, 858 (1973) ("Boeing I"). There is nothing archaic or "unprincipled" about these prior tax-allocation principles; indeed they continue to this day to govern the ongoing performance of Boeing government contracts entered into before the CASB was established. And the DOD continues to use those principles today in current pricing of contracts that are exempt from the cost accounting standards promulgated by the CASB. *See* DPC No. 99, Pet. App. at F-86-87.

"[W]e do not commit to administrative agencies the power to determine constitutionality of legislation."

See also Rosenthal & Co. v. *Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978); *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 936 (2d Cir. 1976).

4. Respondent suggests that this is "a case involving $972" and therefore not of "sufficient importance to warrant this Court's review." Brief in Opposition at 12. This is highly misleading. The government agreed with Boeing in 1974 that this case would be a test case to determine principles that would affect many subsequent Boeing contracts. See p. 3, *supra*. The parties' understanding was confirmed at the outset in the initial ASBCA decision by Judge Nicholas: "The dollar amount here in dispute is token; the principles being litigated affect Boeing's many, and often large, Government contracts." Pet. App. at B-1. After entering agreements for the past nine years with Boeing containing reservation-of-rights clauses referring to this case, it is inappropriate for respondent to urge the Court to disregard this case on the ground that it involves only $972.

This case will resolve not only a large monetary dispute between the parties but also principles that impact generally on future national defense contracts. More broadly, the issues of separation of powers and of constitutionality of the CASB, as well as the application of the *de facto* officer doctrine, raise questions with importance transcending the area of national defense procurements.

CONCLUSION

For the reasons stated in Boeing's Petition for a Writ of Certiorari and this Reply, the Petition should be granted.

Respectfully submitted,

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